

SINGH (Migration) [2019] AATA 1165 (9 January 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Harpreet SINGH
CASE NUMBER:	1724442
DIBP REFERENCE(S):	BCC2014/1742161
MEMBER:	Hugh Sanderson
DATE:	9 January 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 09 January 2019 at 2:49pm

1. CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Federal Court remittal – applicant not spouse of sponsor – relationship contrived for migration purposes – anonymous allegations – lack of evidence – credibility issues – no compelling reasons for not applying Schedule 3 criteria – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 359, 375, 376

Migration Regulations 1994, r 1.15, Schedule 2, cl 820.211, Schedule 3, Criteria 3001, 3003, 3004

CASES

Babicci v MIMIA (2005) 141 FCR 285

Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55

He v MIBP [2017] FCAFC 206

MZYPZ v MIAC [2012] FCA 478

SZOXF v MIBP [2015] FCAFC 69

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 23 December 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 16 July 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner. The delegate also found that the applicant did not hold a substantive visa at the time of the application and did not satisfy criterion 3001 of the Schedule 3 criteria. Further, the delegate was not satisfied there were compelling reasons for not applying those criteria.

Background

5. The applicant is a citizen of India and is currently 35 years old. He first entered Australia on 26 April 2007 holding a Subclass 572 Student visa. He was granted a number of Student visas after that date.
6. The Department wrote to the applicant with a Notice of Intention to Consider Cancellation of his Student visa on the basis that he was not studying in Australia. The applicant did not respond to this notice and on 22 May 2012 the applicant's Student visa was cancelled. He has not held a substantive visa since that date.
7. The applicant filed with the Tribunal (differently constituted) a review of the decision to cancel his Student visa. An issue was raised by the applicant at that time as to whether he had been properly served with the Notice of Intention to Consider Cancellation and the decision of the Department to cancel the visa. The applicant also claimed that he was continuing to study and the ground for the cancellation of the visa was not valid. The applicant withdrew this review application and the matter was finalised by the Tribunal on 7 January 2013.
8. The applicant lodged a Partner visa application on 28 December 2012. He withdrew that application on 20 June 2014 after he was requested to provide compelling reasons why the Schedule 3 criteria should be waived. The current application was then filed on 16 July 2014.
9. The sponsor of the applicant was Rebecca Young. She is currently 28 years old. She was born in Australia and is an Australian citizen.
10. The parties claimed that they first met each other on 14 April 2012. They started talking to each other and a relationship developed after that time. They then decided to marry each other. They claimed that the applicant's parents were happy about the marriage, however, the sponsor's parents were not so happy to accept the applicant. The parties were married on 6 October 2012.

11. The applicant provided various documents in support of the application, including statements by friends, the parties' joint bank account, various accounts in the names of the parties addressed to the homes they claimed to be sharing and photos of the parties together.
12. On 8 September 2015, 20 October 2015 and 18 November 2015 home visits were conducted by officers from the Department to establish whether the parties were living together in the granny flat they claimed to be sharing. On the first two home visits, the applicant was not present. The Departmental officer spoke to the owner of the home who was present and stated each time that the applicant lived in the home by himself.
13. The report from the final visit stated as follows:
 - The officers telephoned the applicant who initially stated that he was currently at his home, but when he was told that was where the officers were he claimed that he was with a friend;
 - The applicant claimed the sponsor had gone to her sister's place but claimed that the sponsor was still living with him;
 - The home had little indication that any female was staying in the home;
 - Although claiming that the sponsor was living in the home with him, the applicant claimed that the sponsor and a friend had tried to kill him;
 - The applicant claimed that he had been living with the sponsor for at least a year prior to an incident when he was threatened by her and a male friend of hers;
 - The applicant showed photos of himself and the sponsor together which he claimed had been taken in September 2015, however, these photos were the same that been previously provided to the Department in December 2014; and
 - The applicant provided little information which would indicate that the sponsor had ever been living with him.
14. The delegate who considered the application noted the following issues:
 - There was little information that the financial aspects of the relationship indicated a genuine relationship with the joint bank account opened by the parties showing little pooling of financial resources or shared household expenses;
 - The applicant had provided a number of documents addressed to both parties at the claimed shared residence, however, this was inconsistent to the information obtained during the home visit and appear to be generated and not a true reflection of the establishment of any household together;
 - The first home visit conducted by the Department occurred prior to when the applicant claimed his relationship with the sponsor had come to an end and the information at that time was that the applicant was living alone;
 - The statements from friends as to the social aspects of the relationship did not provide any convincing information that the relationship was genuine;
 - Allegations had been made that the relationship was not genuine and was contrived for migration purposes with the applicant denying those allegations;

- The photos provided indicated the parties had met each other, but did not provide any convincing information as to the social aspects of the relationship; and
 - The information as to the commitment to any long-term relationship was limited.
15. Taking these matters into account, the delegate was not satisfied that the parties had ever been in a genuine and continuing relationship or that they had a mutual commitment to a shared life as husband and wife with each other. The delegate found that the applicant was not the spouse of the sponsoring partner as defined in s.5F of the Act and accordingly found the applicant did not meet the criteria in cl.820.211(2)(a).
16. The delegate noted the applicant did not hold a substantive visa at the time of the application and did not satisfy criterion 3001 of the Schedule 3 criteria. The delegate considered whether there were compelling reasons for not applying those criteria. In doing this, the delegate took into account the following issues:
- The applicant withdrew a previous Partner visa application before filing the current application which appeared to be an attempt to manipulate his circumstances to be able to claim that the parties had been in a long-term relationship;
 - No evidence had been provided which would substantiate the claim that the applicant had been incorrectly notified of the intention to cancel his Student visa or that he was still studying at the time his visa was cancelled;
 - Although claiming that the sponsor was suffering from depression and drug and alcohol abuse, no information was provided which would substantiate this claim or that the applicant provided any support to the sponsor;
 - Allegations had been received that the relationship was contrived for the purpose of the applicant obtaining a migration pathway to remain in Australia;
 - After initially claiming that the parties were still living together when interviewed during a home visit, the applicant claimed that the sponsor had moved out and had tried to kill him; and
 - The applicant appeared to have manipulated his circumstances to be able to remain in Australia.
17. Taking these matters into account, the delegate was not satisfied there were compelling reasons for not applying the Schedule 3 criteria. Accordingly, the delegate found the applicant did not meet the criteria in cl.820.211(2)(d)(ii). As the applicant did not meet either of these criteria, the delegate refused the application.
18. The applicant applied to the Tribunal (differently constituted) for a review of that decision. The applicant provided a copy of a Provisional Order – Apprehended Domestic Violence Order dated 21 December 2015. The application had been taken out on behalf of the applicant with the defendant stated to be the sponsor. The matter was listed to go before the court on 6 January 2016.
19. In the stated grounds for the application, it was claimed that the sponsor had moved out of the home in August 2015 but on 25 September 2015 the applicant returned to his home and found the sponsor in the home in the company of a male. An incident then happened when the male friend of the sponsor assaulted the applicant, forced him to go to an ATM and used his EFT cards to withdraw cash from an ATM.

20. It was claimed that the sponsor accompanied the applicant and her male friend when this occurred and that the sponsor used the applicant's EFT card "to withdraw \$20 from a joint account that she had not accessed previously and put that money in her pocket".
21. After a hearing, the Tribunal was not satisfied that the parties had ever been in a genuine relationship or there were compelling reasons for not applying the Schedule 3 criteria. The Tribunal affirmed the Department's decision to refuse the application.
22. An appeal by the applicant against this decision to the Federal Circuit Court was remitted by consent when the Department concluded that the Tribunal had failed to advise the applicant of certificates pursuant to ss.375A and 376 of the Act which related to certain documents on the Department's file.

Information to the Tribunal

23. The Tribunal wrote to the applicant on 29 October 2018 inviting him to a further hearing before the Tribunal. The Tribunal noted the Department had issued certificates pursuant to s.375A and s.376 of the Act, and provided copies of the certificates to the applicant and invited him to provide comments on the certificates' validity. The applicant provided a further statutory declaration to the Tribunal.
24. The applicant appeared before the Tribunal on 12 December 2018 to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent who attended the hearing.
25. The Tribunal commenced the hearing by explaining to the applicant it would be putting to him information which would be the reason, or a part of the reason, for affirming the decision under review. It would explain why this information was relevant and invite him to comment on or respond to the information. If he required more time to comment on or respond to the information he could request an adjournment.
26. The Tribunal discussed with the applicant's agent the certificates. It was noted the certificate pursuant to s.375A of the Act referred to the internal processes of the Department when arranging the home visit. As the documents related to internal processes of the Department the information contained was not relevant to the issue before the Tribunal. As to the information in the s.376 certificate, this information related to the home visit, which had been referred to in the Department's decision and, as stated in the certificate, a "dob in" and details of that information would be put to the applicant pursuant to s.359AA. There was no objection to the certificates on this basis.
27. The Tribunal noted that the applicant was now claiming that the relationship between himself and the sponsor had ended and he was claiming to have suffered relevant family violence. The applicant's agent confirmed that the only document provided in support of that claim was the Provisional Order – Apprehended Domestic Violence Order dated 21 December 2015. The Tribunal noted that in the grounds for the application it was stated that the parties had separated in August 2015 and that the alleged incident took place on 25 September 2015. It was claimed that the parties were in a continuing relationship at that time as they were reconciling their relationship.
28. The Tribunal noted that the order was only provisional and there was no information that the sponsor had been given an opportunity to be heard, or otherwise make submissions to the court, in relation to the matter. The applicant's agent confirmed this was correct. The applicant claimed that there were further proceedings and provided a summons to him to appear in District Court proceedings, however, no order or any other information was provided which would indicate any final protection order had been made or that the sponsor

had been convicted of any offence which would indicate the applicant would meet the evidentiary requirements to establish he had suffered relevant family violence.

29. The applicant claimed that when he arrived in Australia he studied English at first, then hospitality management and then enrolled in a business management course which he started, but did not complete. He said that he did not engage in any other studies after the Department cancelled his Student visa. He claimed that he did not think he could study while he was waiting for the review application before the Tribunal to be determined. The Tribunal noted that he had claimed that he had been getting advice from a migration agent and did not accept that he did not believe he could study. The applicant said it was not really a migration agent, just somebody from the paper who was giving him advice.
30. The applicant said that he withdrew the review of the cancellation of his Student visa because he thought he could get the Partner visa to be able to stay in Australia. He then withdrew the Partner visa application because he did not have all the information when he filed that application and saw an agent who told him how he could get the visa and told him what information he would need. The Tribunal put to the applicant that it appeared that he had simply been manipulating his circumstances to be able to remain in Australia. It appeared that the withdrawal of the first Partner visa application was done as he realised there were no compelling reasons for not applying the Schedule 3 criteria and that he hoped that when he filed the second Partner visa application he would now be able to claim he had been in a long-standing relationship. The applicant said that this was not true, it was just that the agent he saw told him he needed to file more information with the application and what other documents he would need to file. He said that as an ordinary person he did not know how to make the application properly.
31. The applicant claimed that when he withdrew it was his intention to return to India and file the application off shore, but the sponsor begged him not to do so. The applicant confirmed that he has a good relationship with his parents and if he had to return to India he would stay with them.
32. The applicant claimed that the sponsor was a drug addict and he was the only person who helped her. He said that this was the normal responsibility of a husband. He said that he helped the sponsor by helping her in meditation and telling her that she could leave drugs. He said that he was not sure if the sponsor ever got professional help. He claimed that she had talked about going to rehabilitation clinics, but did not know what she had done. He said that he did not know because he did not know what Australian citizens can do. He said that apart from meditation and telling her what a professional would say to her he did nothing more for her. He said that they also went to a Sikh temple to pray, but she did not follow any religion.
33. The applicant was unable to name who the sponsor's general practitioner was. He said that she did go and see a doctor, but did not know if she spoke about drugs to him, only if she was sick.
34. The Tribunal noted that it had been claimed that the sponsor had attempted suicide on three occasions. The applicant was not able to provide any details of the suicide attempts, including when they happened or what she did. He did not know if she had obtained any mental health plan or any help after having attempted suicide. He said that he did not ask her any of these things.
35. The applicant claimed that during the processing of the first Partner visa application the sponsor was working as a carer, but stopped this in 2013 as she felt that it was too hard. He claimed that she was not working by the time he filed the second Partner visa application.

He did not know if she was receiving any Centrelink or social security benefits because he did not know what an Australian citizen could get.

36. The applicant said that he had an account in his sole name as did the sponsor and they had a joint account. He claimed they both put money into the joint account and they both used it. He provided vague information as to why this account was opened or how it was used. The Tribunal referred to the Provisional Order – Apprehended Domestic Violence Order and the grounds of the application which the applicant had provided to the police in support of that application. The Tribunal noted that it was claimed in that statement that the sponsor used the victim's EFT card to withdraw \$20 from a joint account that she had not accessed previously. This indicated that the sponsor did not previously use the joint account and did not have access to a card to withdraw any money from that account. This indicated the parties were not pooling their financial resources and the joint account had only been opened to support the Partner visa application.
37. The applicant said that he did not know why he said that she had not previously accessed the account. He said that maybe she used his card because she had forgotten the PIN for her card.
38. The applicant said that he had no contact with the sponsor's parents, but then said that he had met her sister and father but they were not on good terms. It was noted limited information had been provided by any family members as to the social aspects of the relationship. The applicant said that one of the sponsor's friends had provided a statement.
39. The Tribunal referred to the process under s.359AA of the Act referred to above. The Tribunal referred to the home visit that the Departmental officers conducted. The information in that report was that when they first attended the home the applicant was not present and they spoke to neighbours who indicated that the applicant lived alone at that residence. This was relevant as it indicated the applicant and the sponsor did not live together and that their relationship was not genuine and continuing. This also undermined the credibility of the information being provided by the applicant.
40. The applicant said that he did not know why that person would say that and believed that it was because when police arrive people do not want to get involved and so they would not say that anyone else was living there.
41. The Tribunal referred to the home visit and the report from the Departmental officers which indicated that the home did not have any female clothes and that it did not appear the sponsor was living there. This again indicated the parties did not live together and were not in a genuine and continuing relationship.
42. The applicant said that by that time the sponsor had taken almost everything from the home, even his laptop, but there were many things still there and she would return to the home and they were still in a continuing relationship.
43. The Tribunal referred to the anonymous report made to the Department on 12 March 2014 that the sponsor had received money from the applicant to enter into a contrived relationship, that the sponsor was a substance abuser, that she had been admitted to Cumberland Hospital for treatment in June 2013 and that she was receiving a carer's pension to look after her grandparents. This indicated the relationship was contrived and they were not in a genuine relationship.
44. The applicant said that he never paid money to anyone for the relationship. He said that she was receiving a carer's pension because she was looking after her grandparents because she has experience and knows how to look after old people. She said that because they are

related they have love for each other. The Tribunal noted that there had been no statement from the sponsor's grandparents as to the relationship. The applicant claimed that he did not know he needed a statement from the grandparents.

45. The Tribunal referred to the anonymous report made to the Department on 1 October 2014 that the applicant had paid the sponsor money to enter into a contrived relationship and that she was in a relationship with somebody else. This indicated that the parties were not in a genuine relationship and the applicant was not the spouse of the sponsoring partner.
46. The applicant again denied that he ever paid anybody money to enter into a contrived relationship.
47. The Tribunal noted that the allegations that the applicant had asked for money to enter into a contrived relationship seemed to be corroborated by the allegations made by the applicant that the sponsor had been demanding money from him in September 2015. The applicant said that the demands were not made by the sponsor but by Daniel and he supplied the sponsor her drugs and she knew he had money because he worked as a taxi driver.
48. The applicant was given until 18 December 2018 to provide further information.
49. The applicant's agent made submissions that the comments made by the Tribunal when the Tribunal asked why the agent was seeking more time to respond to the s.359AA material put to the applicant and commenting that it appeared to be a characteristic of the agent's firm to do so without any valid reason meant that "it may fall within the ambit of actual or perceived bias".
50. The applicant provided a copy of a Final Order – Apprehended Domestic Violence Order dated 6 January 2016 with the defendant identified as the sponsor.
51. The applicant provided a statutory declaration where he repeated what had been stated during the hearing response to information put to him. The applicant also repeated concerns expressed in the agent's submissions as to actual or perceived bias of the Tribunal.
52. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

Claim of actual or perceived bias

53. In their submissions, the applicant's agent has raised a claim that the manner in which the Tribunal discussed with the agent the request for further time to respond to information put to the applicant pursuant to s.359AA of the Act "may fall within the ambit of actual or perceived bias". Although there is no formal request for the Tribunal member to recuse themselves, the Tribunal has first dealt with this issue.
54. The claims made by the applicant's agent arise as a result of a discussion held between the agent and the Tribunal at the end of the hearing when the agent requested an adjournment to provide a written response to information the Tribunal had put to the applicant pursuant to s.359AA of the Act. When this request was made, the Tribunal asked the agent why he was requesting the adjournment. The agent responded by making various claims including:
 - A comment is different from a response;
 - To respond in writing;

- The applicant is entitled to an adjournment; and
- Each case is different.

55. None of these statements by the agent provided any reason why the applicant would reasonably need additional time to comment on or respond to the information. The Tribunal noted that the applicant had not asked for an adjournment or any further time when the information was initially put to him. He had been given a full opportunity to comment on and respond to the information. The Tribunal was able to engage with the applicant during the hearing when responding to these issues so that other matters could be discussed. The Tribunal noted that it appeared to be a characteristic of the agent's firm to automatically request an adjournment without providing any grounds why the applicant reasonably needs additional time to comment on or respond to the information. Despite this, the Tribunal did provide additional time to the applicant to comment on the information, and that time was agreed to by the agent. As set out above, further information was provided including a copy of a final Apprehended Violence Order.

56. Section 359AA(1) states as follows:

57. If an applicant is appearing before the Tribunal because of an invitation under section 360:

58. (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

59. (b) if the Tribunal does so — the Tribunal must:

60. (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

61. (ii) orally invite the applicant to comment on or respond to the information; and

62. (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

63. (iv) if the applicant seeks additional time to comment on or respond to the information — adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

64. At the time the Tribunal put to the applicant the information which it considered would be the reason, or part of the reason, for affirming the decision under review there was no claim made that the applicant did not understand why the information was relevant or required any additional time to comment on or respond to the information. The Tribunal engaged with the applicant in his response so that the applicant had a complete understanding of the information, why it was relevant, and the Tribunal understood the response the applicant was giving. When the Tribunal had no further questions for the applicant, the applicant's agent did not indicate there were any further issues that they wished the Tribunal to raise with the applicant at the hearing. There was no indication at that time that there was any concern that the Tribunal had asked any inappropriate questions or had conducted the hearing inappropriately.

65. When the request for additional time to comment on or respond to the information was made by the applicant's agent, the Tribunal asked the applicant's agent why additional time was required. As required in s.359AA(1)(b)(iv) the applicant can seek additional time and, if the Tribunal considers the applicant reasonably needs additional time to comment on or respond to the information, the Tribunal can grant an adjournment.
66. For the Tribunal to properly exercise its discretion, it needs to be satisfied that the applicant reasonably needs additional time to comment on or respond to the information. For this reason, the Tribunal asked the applicant's agent why he was seeking additional time. The Tribunal does not find the response given by the applicant's agent satisfactory at all. As was correctly stated by the applicant's agent, each case is different and each case must be dealt with on its own individual merits. The reasons given by the applicant's agent for an adjournment did not deal with the case before the Tribunal. The Tribunal asked the agent to provide any specific reason why an adjournment was required in this case, but none was given. Despite this, the Tribunal agreed to adjourn the review to provide the applicant additional time to provide any further comment on or response to the information put to him.
67. The Tribunal did indicate that it believed that it was a characteristic of the agent's firm to ask for an adjournment without providing any specific reason why the applicant would reasonably need additional time to comment on or respond to information. The Tribunal does not accept that by raising this with the applicant's agent this in any way indicates that there is any actual or perceived bias against the case of the applicant. The Tribunal raised this issue with the applicant's agent to emphasise that in future cases, if the agent is to request an adjournment he should be in a position to be able to provide reasons why the applicant would reasonably need additional time to comment on or respond to the information. As stated above, for the Tribunal to properly exercise its discretion to provide additional time it should not be done simply because the application is made, but because the applicant reasonably needs that additional time.
68. The Tribunal does not accept that in raising this issue of a procedural issue with the applicant's agent in the manner it did indicates any bias against the applicant or the agent. The fact that this procedural issue was raised by the Tribunal and any perceived criticism of the applicant's agent is irrelevant to the information that the Tribunal must take into consideration when assessing the applicant's claims and whether he meets the criteria for the grant of the visa. The Tribunal granted the adjournment and, in its decision below, has taken into account all the information provided by the applicant including the further response provided after the hearing. The Tribunal does not accept that in making its decision and in taking into account all the information before it that there is any actual or perceived bias. For this reason, the Tribunal does not recuse itself from determining the application.

Issues arising from the Department's decision

69. In the decision of the Department it was found that the applicant was not the spouse, as defined in s.5F of the Act, of the sponsoring partner and did not meet the criteria in cl.820.211(2)(a). The delegate also found that the applicant did not meet the Schedule 3 criteria and there were no compelling reasons for not applying those criteria and therefore did not meet the criteria in cl.820.211(2)(d). The Tribunal has first considered whether there are compelling reasons for not applying the Schedule 3 criteria for the applicant to meet the criteria in cl.820.211(2)(d).

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

70. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this

case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).

71. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria.

Criterion 3001

72. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2). In the circumstances of the applicant, the relevant day is the last day he held a substantive visa.
73. The last substantive visa the applicant held was his Student visa which was cancelled on 22 May 2012. He has not held a substantive visa since that date. This is more than two years prior to filing the current application.
74. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

75. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
76. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
77. There is no information which would indicate the applicant would have any difficulties if he was required to return to India. He continues to have a good relationship with his parents who live in India and who he stated approved of his relationship with the sponsor at the time that relationship commenced. He continues to have regular contact with them. There is nothing to indicate that they would not provide support for him if he returned to India. He claims that when he withdrew his first Partner visa application he did so because he intended to return to India. This indicates that the applicant would not have any difficulties in returning to India.
78. The Tribunal finds that the circumstances the applicant would face in India do not provide a compelling reason for not applying the Schedule 3 criteria.
79. It was claimed that the applicant's last substantive visa was cancelled due to circumstances beyond his control. There is no information before the Tribunal that the process adopted by the Department in cancelling the applicant's Student visa was not correctly followed. The Tribunal does not accept that any failure of the applicant to provide the Department correct and up-to-date contact information is simply "due to bad luck" as his former agent claimed. The applicant had an opportunity to ask for a review of the Department's decision with the Tribunal, however, withdrew that application. The Tribunal does not accept that if the

applicant had valid grounds to set aside the Department's decision to cancel his Student visa, he would simply have withdrawn that application for a review of the decision on the basis that he was now seeking a Partner visa. This is particularly so when the applicant subsequently withdrew that application.

80. The applicant withdrew the Partner visa application that he filed prior to withdrawing his application for a review of the decision to cancel his Student visa. No adequate explanation has been given as to why this application was withdrawn and then a further Partner visa application was filed. The only explanation provided by the applicant was that after he withdrew the Partner visa application the sponsor begged him to file the application onshore because she claimed she could not live without him. This indicates a lack of communication between the parties prior to the withdrawal of that earlier application or any discussion as to the plans of the applicant. It does not provide a compelling reason for not applying the Schedule 3 criteria.
81. The applicant claimed during the hearing that he withdrew the first Partner visa application on the basis that he had not provided all the information in support of the application and believed he was required to file a fresh application with that information. The Tribunal does not accept this. There is no restriction on an applicant providing further information and support of any Partner visa application after that application has been filed. The Department wrote to the applicant requesting further information in support of the application before the application was withdrawn. The Tribunal finds that the reason this application was withdrawn by the applicant was that he had been erroneously advised and believed that it would only be on the basis that he had been in a relationship with the sponsor for two years that would provide him a compelling reason for not applying the Schedule 3 criteria. As he had not been in a relationship for two years at the time he filed the first application, he then made the second application.
82. The Tribunal has considered all the circumstances of the applicant as to why he did not hold a substantive visa at the time of the application. The Tribunal is not satisfied that any of the circumstances provide a compelling reason for not applying the Schedule 3 criteria.
83. The Tribunal has not made any critical assessment of whether, at the time of the application, the parties were in a genuine, continuing and exclusive relationship. The Tribunal has accepted at face value the claims made by the applicant that they were in a genuine relationship together and the circumstances of that claimed relationship for the purposes of this decision.
84. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship. The Tribunal has considered all the aspects of the relationship, including the fact that the parties claim to be in a relationship, the length of the claimed relationship, the nature and the extent of the bonds between the parties, and the consequences of any separation even if only for a limited time while an offshore application is being processed when considering if there are compelling reasons for not applying the Schedule 3 criteria.
85. It is claimed that the parties are in a long-standing relationship and this provides a compelling reason for not applying the Schedule 3 criteria. This submission relies upon, in

part, the Explanatory Statement. The Explanatory Statement, providing examples of compelling reasons, states:

86. where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer... In these circumstances, waiver **may** be justified by the hardship which could result if the Schedule 3 criteria were not waived (Tribunal's emphasis).

87. The Tribunal is required to apply the legislation which states that it must be satisfied there are compelling reasons for not applying the Schedule 3 criteria. As is stated in *SZEXP v MIBP* [2015] FCAFC 69 at paragraph 17:

88. Context, such as legislative history or extrinsic materials, is a guide to the meaning of the statute but it "cannot displace the meaning of the statutory text" and it is the meaning of the statutory text which is where the task of statutory construction begins and ends: *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2013) 250 CLR 503, 519.

89. The Explanatory Statement and any guidelines produced by the Department do not provide criteria which, if met, satisfy the requirements of the legislation. If the nature of the relationship between the applicant and the sponsor were to be a compelling reason for not applying the Schedule 3 criteria, all the factors of the relationship, including its duration, the level of financial and emotional commitment, the dependence the parties have upon each other and all other relevant factors must be considered. As is made clear in the Explanatory Statement, the examples provided only may justify the waiver of the Schedule 3 criteria. They do not provide a criterion that, if satisfied, becomes a compelling reason for not applying the Schedule 3 criteria and the Explanatory Statement is not part of the statutory text which is to be considered.
90. It was claimed that the sponsor was dependent upon the applicant due to drug and alcohol issues and other factors in her life which caused her to suffer from depression. This included the death of a child and suicide attempts. It was claimed by the applicant he was the only one who helped her. It was claimed that he had assisted the sponsor by doing meditation with her and telling her to leave drugs.
91. There is no independent information which would indicate that the applicant provided any assistance to the sponsor in respect of any personal issue she may have had. There is no information which would indicate that any actions of the applicant were of any use or benefit to the sponsor. There is no information which would indicate that the sponsor was reliant upon the applicant for any assistance at any time. The applicant has had more than ample opportunity to provide any independent formation which would indicate that he provided any assistance to the sponsor. None has been provided.
92. The applicant was unable to identify the sponsor's general practitioner or provide any information as to what assistance the sponsor obtained from her general practitioner. The fact that the sponsor did not know any of these details indicates the applicant was not actively involved in any treatment the sponsor may have been receiving for any drug, alcohol, depression or any medical condition at all.
93. The applicant now claims that he suffered family violence committed by the sponsor and a friend of hers who he described as the person who supplied her drugs. If this is the case, it would indicate that the sponsor's claimed dependence upon drugs was not tempered by any presence of the applicant and that he did not provide any effective assistance to her in respect of any drug habit she may have.

94. The applicant now claims that the relationship has ended. As stated above, for the purpose of assessing whether there are compelling reasons for not applying the Schedule 3 criteria, the Tribunal has accepted the claims made by the applicant as to his relationship with the sponsor without any critical examination. If the relationship did end in the manner as claimed by the applicant this could indicate that the sponsor had little or no commitment to her relationship with the applicant and that she did not consider that he was providing her any emotional or other support for any drug addiction or any other medical condition she may have been suffering from.
95. The Tribunal has considered all the circumstances of the applicant's claimed relationship with the sponsor. The Tribunal is not satisfied that any of the circumstances of the claimed relationship, including its length and any claimed support that the applicant and the sponsor may have at any time provided to each other, provides a compelling reason for not applying the Schedule 3 criteria.
96. The Tribunal has assessed the circumstances of the applicant and the sponsor both individually and cumulatively. As set out above, the Tribunal is not satisfied that the individual circumstances of the parties and in particular the claims made by the parties when considered on an individual basis provide a compelling reason for not applying the Schedule 3 criteria. The Tribunal is not satisfied that when considered in combination the total circumstances of the parties provide a compelling reason for not applying the Schedule 3 criteria.
97. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).

Whether the parties are in a spouse or de facto relationship

98. As set out above, the Tribunal has concluded based on accepting the claims made by the applicant of the relationship between himself and the sponsor that he does not meet the criteria in cl.820.211(2)(d)(ii). The Tribunal has also considered whether the applicant was ever the spouse of the sponsoring partner as defined in s.5F of the Act.
99. Clause 820.211(2)(a) requires that at the time the visa application was made the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claimed to be the spouse of the sponsor who is an Australian citizen.
100. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

101. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 6 October 2012. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the

parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

102. There is little information which would indicate the financial arrangements of the parties supports a finding they were in a genuine and continuing relationship. The parties opened a joint bank account, however, there is no clear indication as to who deposited money into this account or who actually used the account. If the account was genuinely opened by the parties for the pooling of their financial resources it would be expected that the incomes of both the applicant and the sponsor would be deposited into this account. This is not reflected in the details of the account provided.
103. In the statement provided by the applicant when he applied for an Apprehended Violence Order against the sponsor he claimed that the sponsor forced him to give her his "EFT card to withdraw \$20 from a joint account that she had not accessed previously". The fact that he would make this statement indicates that the sponsor never had access to this account and that the opening of the joint account was simply for the purpose of generating documentation to support the Partner visa application and was not a true reflection of any claimed relationship between the applicant and the sponsor. This undermines the credibility of the applicant.
104. When this information was put to the applicant at the hearing, he claimed that he did not know why the sponsor had not previously accessed the account and believed that she may have used his card, after taking it from him by force, as she had forgotten the PIN for her card. This is an implausible claim by the applicant. If the account was a joint account, the sponsor would have been able to obtain access to this account without having to force the applicant to give her his card and force him to provide his PIN. That the applicant made the claim to the Tribunal further undermines his credibility.
105. The applicant had no knowledge of the sponsor's financial affairs. He said that she was receiving a carer's pension for caring for her grandmother, but did not know any details of whether the sponsor received any pension or any details of her financial affairs. There is no information that the sponsor contributed any income she may have earned, either by way of pension or salary, into the combined financial resources of the parties. There is no evidence that the parties were pooling their financial resources.
106. The applicant did provide accounts that had been generated in the joint names of the parties and a joint residential tenancy agreement in the joint names of the parties. A receipt was obtained from a retailer in the joint names of the parties. The Tribunal places limited weight on this information as it appears again to have been generated for the purposes of the Partner visa application. There is no information as to who actually made the payments for these accounts or any indication that there was any sharing of the day-to-day household expenses. There is no information that the parties jointly own any assets of significance.
107. Overall, there is limited information which would support a finding that the financial aspects of the relationship indicated the parties were in a genuine and continuing relationship or that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Household

108. The applicant provided a joint residential tenancy agreement and correspondence addressed to the parties at the home it was claimed they shared.
109. The Department conducted three home visits at the home, which is a granny flat, which was claimed to be shared by the applicant and the sponsor. On the first two occasions, the applicant was not present and the officers spoke to the occupant of the main house who confirmed that the applicant lived there alone. There was no indication that the sponsor had ever lived in the home. The applicant could give no rational explanation as to why, if he had been living with the sponsor, the occupant of the main house would say that he lived there alone. He claimed that it was because that person may have believed the Departmental officers were police and did not want to get involved with anyone else who was living there. This explanation is implausible as there would be no reason for the occupant of the main house not to say that the parties lived together as a couple if that was the case or to lie to the officers, even if they did believe they were the police. The Tribunal places significant weight on this information provided by an independent person to the Department living in the main home from the granny flat of the applicant who would have had the opportunity to observe over an extended period that the applicant had been there living alone.
110. When the Departmental officers attended at the home on a third occasion the applicant was not present in the home and the officers telephoned him. He initially stated that he was in his residence. When the officers stated that this was not correct, he claimed that he was at a friend's place. The applicant claimed that he provided this false information to the Departmental officers because he panicked. The Tribunal does not accept there was any valid reason for the applicant to provide this false information and indicates again that the applicant lacks credibility and is willing to provide false information to the Department.
111. Although the applicant initially claimed that he was still living with the sponsor, the report from the Departmental officers indicated that the applicant was living alone and there was little indication that he had ever shared a home with the sponsor.
112. Overall, there is limited information which would indicate that the parties were genuinely living together in a shared household at any time. The Tribunal places significant weight on the comments made by the neighbour of the applicant that only the applicant lived in the granny flat which he claimed he was sharing with the sponsor. The Tribunal finds that the nature of any claimed household of the parties did not indicate the parties were living in a genuine and continuing relationship or they had a mutual commitment to a shared life as husband and wife to the exclusion of all others at any time.

Social aspects

113. There is limited information as to the social aspects of the relationship. Two statements have been provided by friends of the applicant claiming the relationship is genuine. Apart from saying that they believe the relationship is genuine and continuing there is little information which they provide indicating that the relationship is recognised by the community generally as being genuine.
114. The photos provided of the applicant and the sponsor show the parties together on only limited occasions.
115. The applicant claimed the sponsor did not have a good relationship with her family. Despite this, he claimed that the sponsor looked after her grandparents and they loved each other. If the sponsor was the carer of her grandparents and they loved each other as the applicant claims, the Tribunal does not accept that if the claimed relationship between applicant and

the sponsor was genuine they would not have provided a statement to support the application. That no information was provided from any family members of the sponsor that she was in a relationship with the applicant does not support a finding that the sponsor represented herself as being married to the applicant or that their relationship was recognised as genuine.

116. The Tribunal is not satisfied that the social aspects of the relationship supported a finding that the parties were in a genuine and continuing relationship or that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. There is no information from the sponsor's family, and in particular her grandparents who it was claimed she was the carer for and they loved her, to indicate that the relationship was recognised as being genuine. There is limited information that the parties were together at any time or they participated in any joint social activities at any time.

Commitment

117. The parties claimed that they first met each other in May 2012. This was at the time that the applicant's student visa was cancelled. They were married on 17 December 2012. The applicant has made various claims as to when he believed the relationship came to an end. The applicant's claim is that at best the relationship lasted three years.
118. As indicated above when considering the Schedule 3 issue, the Tribunal does not accept that the parties displayed any degree of commitment or emotional support for each other which would be expected in a genuine relationship. Although claiming that the sponsor was dependent upon him for support due to her suffering from depression and drug addiction, there is nothing to indicate that the applicant provided any support to her for this or any other reason. He was not aware of any treatment she received from any medical practitioner and apart from meditation and attending a Sikh temple, does not appear to have provided any treatment for any issues she may have been suffering from. The statement provided from Ranjodh Sandhu after the hearing reports seeing the applicant and the sponsor together in a "very happy and joyful state". This is not supporting the applicant's claim that he was taking her to the temple to address her drug addiction and depression issues.
119. There is little probative evidence to support any finding that the parties provided any companionship or emotional support to each other which would be expected in a genuine relationship. The evidence of the applicant is the relationship ended with the sponsor and a male friend demanding money from the applicant. Although it was claimed that the sponsor suffered from various medical issues, there was no evidence presented that at the time of the application or at any time of these medical conditions from any independent medical source and no independent information that the applicant was providing the sponsor any support for these conditions.
120. When considering the weight of evidence, the Tribunal finds that the parties never had any commitment to any genuine relationship with each other.

Other issues

121. The Department received anonymous allegations that the relationship was not genuine and that the applicant had paid the sponsor to agree to enter into a contrived relationship. The applicant denied these allegations. The Tribunal places little or no weight on anonymous allegations made where there is no corroborative or supporting information to substantiate the claims. The Tribunal and the applicant do not have the opportunity to question the bona fides of the people making the allegations or the allegations themselves.

122. The Tribunal has considered all the circumstances of the claimed relationship both individually and cumulatively. Although the applicant provided various documents to support the application, the Tribunal has significant concerns as to whether these documents are a genuine reflection of any claimed relationship or have been generated simply for the purpose of assisting the Partner visa application.
123. As indicated above, the joint bank account does not appear to have been used by the sponsor at all throughout their relationship. The reason for opening this account appears to have only been to support the application and for no other reason. This raises a concern that the other accounts opened in the parties' joint names have again only been done so for the purposes of the application and are not a true reflection of the relationship.
124. The applicant did not present as a creditable witness. His evidence was generally vague and showed a lack of candour. When he was contacted by Departmental officers conducting a home visit, he provided false information as to where he was. The Tribunal does not accept that any tension or nervousness on behalf of the applicant would cause him to provide false information to the officers when they asked him where he was.
125. It was only when the Department were conducting the home visit that the applicant advised them that he was no longer in a relationship with the sponsor, despite initially saying that the sponsor did continue to live with him in the home. Again, this indicates the applicant is willing to provide false information to the Department depending on what he believes would be best to get him granted a visa to remain in Australia.
126. When considering all the information before the Tribunal, the Tribunal finds the weight of evidence does not support a finding that the parties at any time had a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the claimed relationship between the parties was ever genuine and continuing or that they lived together.
127. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made.
128. Therefore the applicant does not meet cl.820.211.
129. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

130. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).